

1 Rule 3.6. Trial Publicity.

2 (a) A lawyer who is participating or has participated in the investigation or litigation
3 of a matter shall not make an extrajudicial statement that ~~a reasonable person would~~
4 ~~expect to the lawyer knows or reasonably should know will~~ be disseminated by means
5 of public communication ~~if the lawyer knows or reasonably should know that it and~~ will
6 have a substantial likelihood of materially prejudicing an adjudicative proceeding in the
7 matter.

8 (b) Notwithstanding paragraph (a), a lawyer may state:

9 (b)(1) the claim, offense or defense involved and, except when prohibited by law, the
10 identity of the persons involved;

11 (b)(2) information contained in a public record;

12 (b)(3) that an investigation of a matter is in progress;

13 (b)(4) the scheduling or result of any step in litigation;

14 (b)(5) a request for assistance in obtaining evidence and information necessary
15 thereto;

16 (b)(6) a warning of danger concerning the behavior of a person involved, when there
17 is reason to believe that there exists the likelihood of substantial harm to an individual or
18 to the public interest; and

19 (b)(7) in a criminal case, in addition to subparagraphs (1) through (6):

20 (b)(7)(i) the identity, residence, occupation and family status of the accused;

21 (b)(7)(ii) if the accused has not been apprehended, information necessary to aid in
22 apprehension of that person;

23 (b)(7)(iii) the fact, time and place of arrest; and

24 (b)(7)(iv) the identity of investigating and arresting officers or agencies and the
25 length of the investigation.

26 (c) Notwithstanding paragraph (a), a lawyer may make a statement that a
27 reasonable lawyer would believe is required to protect a client from the substantial
28 undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's
29 client. A statement made pursuant to this paragraph shall be limited to such information
30 as is necessary to mitigate the recent adverse publicity.

31 COMMENT

(d) No lawyer associated in a firm or government agency with a lawyer subject to paragraph (a) shall make a statement prohibited by paragraph (a).

Comment

[1] It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at ~~assuring~~ensuring its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.

[2] Special rules of confidentiality may validly govern proceedings in juvenile, domestic relations and mental disability proceedings, and perhaps other types of litigation. Rule 3.4(c) requires compliance with such rules.

[3] ~~The~~is Rule sets forth a basic general prohibition against a lawyer's making statements that the lawyer knows or should know will have a substantial likelihood of materially prejudicing an adjudicative proceeding. Recognizing that the public value of informed commentary is great and the likelihood of prejudice to a proceeding by the commentary of a lawyer who is not involved in the proceeding is small, this Rule applies only to lawyers who are, or who have been, involved in the investigation or litigation of a case and their associates.

[4] Paragraph (b) identifies specific matters about which a lawyer's statements would not ordinarily be considered to present a substantial likelihood of material prejudice, and should not in any event be considered prohibited by the general prohibition of paragraph (a). Paragraph (b) is not intended to be an exhaustive listing of the subjects upon which a lawyer may make a statement, but statements on other matters may be subject to paragraph (a).

[5] There are, on the other hand, certain subjects ~~which~~that are more likely than not to have a material prejudicial effect on a proceeding, particularly when they refer to a civil matter triable to a jury, a criminal matter_; or any other proceeding that could result in incarceration. These subjects relate to:

(4i) the character, credibility, reputation or criminal record of a party, suspect in a criminal investigation or witness, or the identity of a witness, or the expected testimony of a party or witness;

(2ii) in a criminal case or proceeding that could result in incarceration, the possibility of a plea of guilty to the offense or the existence or contents of any confession, admission_; or statement given by a defendant or suspect or that person's refusal or failure to make a statement;

(3iii) the performance or results of any examination or test or the refusal or failure of a person to submit to an examination or test, or the identity or nature of physical evidence expected to be ~~present~~presented;

(4iv) any opinion as to the guilt or innocence of a defendant or suspect in a criminal case or proceeding that could result in incarceration;

(5v) information that the lawyer knows or reasonably should know is likely to be inadmissible as evidence in a trial and that would, if disclosed, create a substantial risk of prejudicing an impartial trial; or

(6vi) the fact that a defendant has been charged with a crime, unless there is included therein a statement explaining that the charge is merely an accusation and that the defendant is presumed innocent until and unless proven guilty.

[6] Another relevant factor in determining prejudice is the nature of the proceeding involved. Criminal jury trials will be most sensitive to extrajudicial speech. Civil trials may be less sensitive. Non-jury ~~hearing~~hearings and arbitration proceedings may be even less affected. The~~is~~ Rule will still place limitations on prejudicial comments in these cases, but the likelihood of prejudice may be different depending on the type of proceeding.

[7] Finally, extrajudicial statements that might otherwise raise a question under this Rule may be permissible when they are made in response to statements made publicly by another party, another party's lawyer_; or third persons, where a reasonable lawyer

would believe a public response is required in order to avoid prejudice to the lawyer's client. When prejudicial statements have been publicly made by others, responsive statements may have the salutary effect of lessening any resulting adverse impact on the adjudicative proceeding. Such responsive statements should be limited to contain only such information as is necessary to mitigate undue prejudice created by the statements made by others.

[8] See Rule 3.8(f) for additional duties of prosecutors in connection with extrajudicial statements about criminal proceedings.